Office-Supreme Court, U.S.
FILED
APR 19 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-6080

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

THOMAS A. BAREFOOT, *Petitioner*,

v.

W. J. ESTELLE, JR., DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS, *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

WILL GRAY
(Counsel of Record)
CAROLYN GARCIA
2038 Lexington Street
Houston, Texas 77098
(713) 759-0585
Counsel for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
TABLE OF CASES	ii
TABLE OF STATUTES	ii
TABLE OF OTHER AUTHORITIES	iii
SUMMARY OF ARGUMENT OF REPLY BRIEF	1
ARGUMENT IN REPLY:	
I. NECESSITY FOR PSYCHIATRIC TESTIMONY ON THE ISSUE OF FUTURE DANGEROUSNESS IN THE ASSESSMENT OF THE DEATH PENALTY	1
II. THE PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY IN BAREFOOT'S TRIAL IS NOTHING MORE THAN FANTASTIC SPECULATION, IS UNRELIABLE, AND AS SUCH IS INADMISSIBLE IN TEXAS CAPITAL PUNISHMENT HEARINGS	9
CONCLUSION	18

TABLE OF AUTHORITIES

CASES: Page

Barefoot v. *Estelle*, 697 F.2d 598 (5th Cir. 1983) 1

Blansett v. *State*, 556 S.W.2d 322 (1977) 7

Coker v. *Georgia*, 433 U.S. 584 (1977) 8

Eddings v. *Oklahoma*, 71 L.Ed.2d.1, (1982) 16, 18

Enmund v. *Florida*, 73 L.Ed. 1140 (1982) 8

Estelle v. *Smith*, 451 U.S. 454 (1981) 1, 7, 15

Gardner v. *Florida*, 430 U.S. 349 (1977) 13

Gregg v. *Georgia*, 428 U.S. 153 (1976) 17

Jurek v. *Texas*, 428 U.S. 262 (1976) ... 5, 7, 14, 15, 19, 20

Jurek v. *State*, 522 S.W.2d 934 (1975) 5

People v. *Murtishaw*, 631 P.2d 446, 175 Cal.Rptr. 738, *cert. denied*, 429 U.S. 1103 (1977) 11, 12

Smith v. *Commonwealth*, 219 Va. 455, 248 S.W.2d 135 (1978), *cert. denied*, 441 U.S. 967 (1979) 4

Smith v. *Estelle*, 451 F.2d 694 (5th Cir. 1979) 7, 19

State v. *Osborn*, 631 P.2d 187 (1981) 3

United States v. *Cohen*, 530 F.2d 43 (5th Cir. 1976), *cert. denied*, 429 U.S. 855 (1976) 7

White v. *Estelle*, 554 F.Supp. 851 (S.D. Tex. 1982) ... 19

Woodson v. *North Carolina*, 428 U.S. 280 (1976) 13

STATUTES:

Idaho Code § 18.4004 (1979) 3

Idaho Code § 19.2515 (1979) 3

Idaho Code § 19.2515(f)(8)(1979) 3

Md. Crim. Law Code Ann. art. 27 § 412(b)(1980) 4

Md. Crim. Law Code Ann. art. 27 § 413(d)(1980) 4

Md. Crim. Law Code Ann. art. 27 § 413(g)(7)(1980) ... 4

Okla. Stat. tit. 21, § 701.10 (West 1951) 2

Okla. Stat. tit. 21, § 701.11 (West 1951) 2

Okla. Stat. tit. 21, § 701.12 (West 1951) 1

Va. Code art. 27, § 18.2-31 3

Table of Authorities Continued

Page

Va. Code art. 27, § 19.2-264.2(1) 3
Va. Code art. 27, § 19.2-264.2(2) 3
Va. Code art. 27, § 19.2-264.4B 3
Va. Code art. 27, § 19.2-264.4C 4
Wash. Rev. Code Ann. § 10.95.020 2
Wash. Rev. Code Ann. § 10.95.030 2
Wash. Rev. Code Ann. § 10.95.050 2
Wash. Rev. Code Ann. § 10.95.060(4) 2
Wash. Rev. Code Ann. § 10.95.070(8) 2

OTHER AUTHORITIES:

Benson, *Texas Capital Sentencing Procedure After Eddings: Some Questions Regarding Constitutional Validity*, 23 S. Texas L.J. 2 (1982) 5

Brief for American Psychiatric Association as Amicus Curiae 13, 14, 17

Brief for NAACP Legal Defense Fund 9

Dix, *Administration of the Texas Death Penalty Statutes: Constitutional Infirmities Related to Prediction of Dangerousness*, 55 Texas.L.Rev. 1343 (1977) 6

Dix, *Constitutional Validity of the Texas Capital Murder Scheme: A Continuing Question*, 43 Texas B.J.627 (1980) 6

Dix, *Participation by Mental Health Professionals in Capital Sentencing*, 1 Int'l. J. of L. and Psych., 283 (1978) 12

Garrett, *People* v. *Murtishaw: Applying the Frye Test to Psychiatric Predictions of Dangerousness in Capital Cases*, 70 Calif. L. R. 1069 (1982) 12

Monahon, *The Clinical Prediction of Violent Behavior* (1981) 13

Brief for Respondent 10, 11, 13, 14, 17

SUMMARY OF ARGUMENTS

Respondent's claim that the petitioner was not deprived of due process of law by the state's use of hypothetical questions posed to expert psychiatric witnesses at the punishment phase of his trial is based upon the specious argument, adopted without examination by the district court and the court of appeals, that "the import of Petitioner's position, combined with the holding in *Estelle* v. *Smith*, is to bar the prosecution from ever presenting psychiatric testimony at the punishment phase of Texas capital murder trials. Under *Estelle* v. *Smith*, [451 U.S. 454 (1981)] the state cannot compel the defendant to submit to a psychiatric examination for the purpose of assessing his future dangerousness, *possibly even where the defendant himself presents such testimony. Estelle* v. *Smith*, 451 U.S. at 466, n.10, 468, 472. And if a mental health professional cannot testify upon the basis of a hypothetical question 'we would be giving the defendant the right to prevent any and all psychiatric testimony on the issue of dangerousness except psychiatric testimony in his own favor.' *Barefoot* v. *Estelle*, 697 F.2d at 598." (Respondent's brief at page 43).

This basic claim presupposes the validity of his second argument, that such testimony is reliable, and the collateral assertions that (1) the reliability of the evidence outweighs its prejudicial impact upon the jury, or (2), the unreliability and inaccuracy of the predictions affect their weight rather than their admissibility.

NECESSITY FOR PSYCHIATRIC TESTIMONY ON THE ISSUE OF FUTURE DANGEROUSNESS IN THE ASSESSMENT OF THE DEATH PENALTY

Texas, Oklahoma, Washington, Maryland, Idaho and Virginia are the only states that utilize the issue of future dangerousness in the assessment of the death penalty.

OKLAHOMA

Oklahoma Statutes Title 21, Section 701.12 lists eight aggravating circumstances to be considered by the jury in a

capital case. The seventh of these is "The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."

While no mitigating factors are specifically enumerated, Section 701.10 provides that "evidence may be presented as to any mitigating circumstances," and Section 701.11 excludes the death penalty "if it is found that any [statutory] circumstance is outweighted by the finding of one or more mitigating circumstance."

Thus, even though the jury finds that a defendant will probably commit criminal acts of violence that would constitute a continuing threat to society, he could still receive a life sentence if the jury also found that this aggravating circumstance was outweighed by the finding of one or more mitigating circumstance.

WASHINGTON

RCW 10.95.020 specifies ten aggravating circumstances which elevate first degree murder to aggravated first degree murder. None of these circumstances involve the issue of future dangerousness.

A defendant who is convicted of aggravated first degree murder is sentenced to life imprisonment without parole unless, at a special sentencing proceeding held under RCW 10.95.050, "the trier of facts finds that there are not sufficient mitigating circumstances to merit leniency," in which case he is sentenced to death. RCW 10.95.030. The jury is required to answer one question; "Having in mind the crime of which the defendant is found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" RCW 10.95.060(4).

In answering this question the jury may consider "any relevant factors, including but not limited to the eight specifically named in the statute. Included in the statutory factors is "Whether there is a likelihood that the defendant will pose a danger to others in the future." RCW 10.95.070(8).

IDAHO

Punishment for murder of the first degree is either death or life imprisonment. Idaho Code 18-4004. The court may not impose a sentence of death unless it finds at least one statutory aggravating circumstance. Where the court finds such aggravating circumstance the defendant shall be sentenced to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust. Idaho Code 19-2515. No mitigating circumstances are prescribed by statute. Among the aggravating factors listed is; "The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society." Idaho Code 19-2515-(f)(8).

The Idaho court held, in *State* v. *Osborn*, 631 P.2d 187 (1981), that since it was unconstitutional for a legislature to limit the sentencing body's consideration of mitigating factors to those specified in a statute, the failure of the Idaho statute to specify mitigating factors demonstrated its constitutionality.

VIRGINIA

The Virginia Code, Section 18.2-31 specifies six capital murder offenses. The conditions for imposition of a death sentence are contained in Code Section 19.2-264.2 (1) and (2). The sentencer must find, (1) after consideration of the past criminal record of convictions of the defendant, that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct is committing the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

Code Section 19.2-264.4B, governing the sentencing proceeding, provides that "Facts in mitigation of evidence may include but shall not be limited to the following: (i) The defend-

ant has no significant history of prior criminal activity, or (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance or (iii) the victim was a participant in the defendant's conduct or consented to the act, or (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; or (v) the age of the defendant at the time of the commission of the capital offense.

"The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim." Section 19.2-264.4(C).

Even when the Commonwealth proves either or both aggravating circumstances, the jury is at liberty, in consideration of circumstances in mitigation, to recommend a sentence of life imprisonment. *Smith* v. *Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978), *cert den.* 441 U.S. 967 (1979).

MARYLAND

Article 27, Section 412(b), Annotated Code of Maryland, provides a penalty of either death or life imprisonment for first degree murder. Section 413(d) lists 10 aggravating circumstances. If the jury or court does not find beyond a reasonable doubt that one or more of these aggravating factors exist, the defendant receives a life sentence. Even if one or more of the aggravating circumstances are proven, the sentencer must consider whether, based upon a preponderance of the evidence, any of the mitigating circumstances listed under subsection (g) exist. One of these factors, (g)(7), is whether "It is

unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society."

If the sentencer finds that one or more of the mitigating factors exist, it shall determine whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances. If they do, the sentence is life; if not, death.

TEXAS

The consensus of those jurisdictions with capital punishment statutes is that future dangerousness, per se, is not critical to the assessment of the death penalty. Even the five states that utilize the concept of future dangerousness provide that such a finding, standing alone, will not suffice to support a death sentence in the face of Eighth Amendment considerations. Each provides varying methods whereby the sentencing authority may assess life imprisonment, even though the state proves a defendant's probable future dangerousness.

The Texas statutory scheme differs fundamentally from those outlined above, despite what a plurality of this Court was led to believe in *Jurek* v. *Texas*, 428 U.S. 262 (1976). The only mitigating evidence admissible in Texas is geared solely to the issue of a defendant's future dangerousness. See Benson, *Texas Capital Sentencing Procedure After Eddings: Some Questions Regarding Constitutional Validity*, 23 South Texas L. J. 315.

The Court of Criminal Appeals clearly stated, in *Jurek* v. *State*, 552 S.W.2d 934, 939-940 (Tex.Cr.App. 1975) that:

> "In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional

> pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand."

One of the critical defects in the Texas procedure is that [e]vidence is deemed material only if it bears on the defendant's dangerousness within the meaning of question two [relating to the probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society] . . . The decisions . . . provide no guidance on how a jury might balance factors that mitigate the defendant's ethical blameworthiness with factors that suggest his continued dangerousness when the evidence indicates the presence of both factors." Dix, *Administration of the Texas Death Penalty Statutes: Constitutional Infirmities Related to the Prediction of Dangerousness*, 55 Tex.L.Rev 1343 (1977) and Dix, *Constitutional Validity of the Texas Capital Murder Scheme: A Continuing Question*, 43 Tex.B.J. 627 (1980).

Professor Benson noted a second fundamental defect in the Texas capital murder sentencing procedure.

> "The final and most serious problem is that a Texas jury, under the present capital sentencing scheme, cannot make a meaningful, binding response to mitigating evidence that goes beyond the scope of the three special issues, even if the trial court decides to admit such evidence . . . The trial judge has no authority to submit any other issues, regardless of the posture of the mitigating evidence he or she may have allowed to go before the jury. The jury has no authority to return any answers or other form of verdict or sentence recommndation, except the two . . . special issues, each of which must be answered simply 'yes' or 'no' without further elaboration . . . The trial court has no way to instruct the jury what to do with [mitigating] evidence and cannot submit an additional special issue under the present statutory scheme. Thus a Texas jury is effectively and completely blocked from considering such mitigating evidence in a meaningful way and thereby making a meaningful, and binding response to it." Benson, supra, at pages 329-331.

Thus, unlike the Oklahoma, Washington, Maryland, Idaho and Virginia juries, the only way that a Texas jury can grant leniency at the punishment phase of a capital murder trial is to ignore the court's instructions and return a negative answer to one of the special issues. See *Blansett* v. *State*, 556 S.W.2d 322, 327, n.6 (Tex.Cr.App. 1977).

It is against this statutory backdrop that respondent claims a ban on the use of hypothetical questions in eliciting psychiatric testimony would give a defendant the right to prevent any and all psychiatric testimony on the issue of dangerousness except psychiatric testimony in his own favor.

This Court held in *Jurek* v. *Texas*, 428 U.S. 262 (1976), that the jury is capable of predicting future dangerousness.

"[T]he inquiry necessary for the jury's resolution of the future dangerous issue is in no sense confined to the province of psychiatric experts." *Estelle* v. *Smith*, 451 U.S. 454, 473 (1981). "While in no sense disapproving the use of psychiatric testimony bearing on the issue of future dangerousness, the holding in *Jurek* was guided by recognition that the inquiry mandated by Texas law does not require resort to medical experts." *Ibid.*

Respondent argued in *Smith* v. *Estelle*, 602 F.2d 694, 704-705 (5th Cir. 1979), *aff'd sub. nom. Estelle* v. *Smith*, 451 U.S. 454 (1981), that *United State* v. *Cohen*, 530 F.2d 43 (5th Cir. 1976), *cert. den.* 429 U.S. 855 (1976), entitled the state to force "capital defendants to undergo a psychiatric examination designed to decide whether they are likely to commit violent crimes in the future," even though the defendants never use psychiatric evidence and never suggest that they might.

Rejecting this contention, the Court said, page 705:

> "The second and most important premise of *Cohen* was that if a defendant raises insanity as a defense, and introduces psychiatric testimony, 'the government will seldom have a satisfactory method of meeting defendant's proof on the issue of sanity except by the testimony of a psychiatrist it selects . . . who has had the opportunity to

> form a reliable opinion by examining the accused. [citations omitted]. At most, this rationale of *Cohen* implies that a defendant who introduces the results of a psychiatric examination at the sentencing phase of a capital trial must submit to an examination by a psychiatrist nominated by the state."

Preventing the prosecution from relying on either compelled psychiatric examinations or hypothetical questions propounded to psychiatric witnesses "will scarcely disable it from proving the defendant's dangerousness in appropriate cases . . . Moreover, the inquiry demanded by Texas's second question is not obviously a matter for psychiatrists."

None of the other five states that utilize the "future dangerousness" concept rely upon psychiatric testimony to secure a death sentence. None of these states have appeared as amici in the present proceeding on this issue, although both Idaho and Virginia have joined respondent as amici on the "standards" issue.

While both *Coker* v. *Georgia*, 433 U.S. 584 (1977), and *Enmund* v. *Florida*, ___ U.S. ___, 73 L.Ed2d 1140 (1982), related to excessive punishment under the Eighth Amendment, their rationale is applicable to the issue of hypothetical psychiatric testimony, assuming that such evidence is reliable, or, if unreliable, that its use goes to weight and not admissibility.

In both *Coker* and *Enmund* this Court looked to the historical development of the punishment at issue, determined that it was presently sanctioned by a small minority of the states, and concluded that it had been largely rejected by society.

A similar analysis of the *method* used by Texas to obtain a death sentence—one uniformly rejected by every other state, and by the psychiatric profession itself—results not only in an unreliable punishment verdict but also in excessive punishment.

The future dangerousness issue as utilized in Texas, where all mitigating evidence that is not relevant to the issue, even

though directly bearing upon the possibility of leniency, is inadmissible, is peculiarly designed to eliminate the jury's consideration of even this limited mitigation where the state presents "expert" testimony that death is the only proper sentence for the defendant on trial.

THE PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY IN BAREFOOT'S TRIAL IS NOTHING MORE THAN FANTASTIC SPECULATION, IS UNRELIABLE, AND AS SUCH, INADMISSIBLE IN TEXAS CAPITAL PUNISHMENT HEARINGS

Respondent's brief reviewing the evidentiary hearing, and his interpretation of positions stated in the Amicus brief of American Psychiatric Association, (hereafter Amicus APA) and representations of the import of certain scientific studies on predicting future dangerousness by mental health experts, misstates the record and the studies.

Respondent finally concedes that at the evidentiary hearing, in 86 pages of testimony by Dr. Fason and the 41 pages by Dr. Dickerson, both *refused to diagnose* Barefoot on the basis of the same hypothetical presented to Grigson and Holbrook at the punishment phase of Barefoot's trial. At most, both might, for the purposes of the hearing, give an *impression* that the behavior described was not inconsistent with behavior observed in a personality disorder commonly known as "antisocial personality". Fason and Dickerson in no wise voiced accord with the diagnosis and predictions of any of Respondent's experts at the evidentiary hearing or at Barefoot's trial. A fair review of the habeas record, the summary of same in Petitioner's original brief and briefs of the American Psychiatric Association and NAACP Legal Defense and Educational Fund, Inc., emphasizes the glaring misstatements and misrepresentations of Respondent to the courts below which were adopted by both courts below. In spite of his concession, *now*, which is inescapable, that Barefoot's experts at the habeas hearing refused to make a diagnosis of Barefoot because they testified that to do so under the circumstances [of

[the hypothetical] was *unreliable*, *unethical*, and *speculation*, Respondent persists in attempting to mislead this Court by stating that all experts agreed that Barefoot would continue to commit future acts of violence posing a danger to society (Respondent's Brief at 47) Respondent asserts "Accordingly, it is not surprising that all four experts at the federal evidentiary hearing comfortably predicted that Petitioner would continue to commit future acts of violence posing a danger to society. Not so.

Dr. Fason testified that on the basis of the hypothetical, an educated guess or impression *only* was possible. He stated that as a psychiatrist he could not testify that there was no cure for a sociopathic condition and *could not testify that a defendant sentenced to life in prison would present a danger to other inmates* (T. 46-47) The basis for any impression under the circumstances of the hypothetical, could not approach a level of reliability of reasonable medical probability required of expert medical opinions (T 44). The data presented in the hypothetical was insufficient for any responsible competent physician to arrive at a diagnosis reliably (T 54).

Dr. Dickerson compared the chances of a correct medical diagnosis under the data presented to betting on a horse race (T 116). He emphasized that *medical experts are incapable of predicting long-term future dangerousness* (T. 95, 100, 108) *and that expert predictions were wrong, or false, two out of three times* (T 108). To whatever degree of certainty, even 100%, a prediction of future dangerousness is predicted by a mental health expert, Dickerson acknowledged that that prediction was wrong over 65% of the time. (T 118).

Both Fason and Dickerson emphasized that other mental disorders, if any existed, could not be ruled out on the basis of the information and that a diagnosis of any kind, particularly, "antisocial personality", made without any examination or evaluation of the subject was incompetent. On the same basis, for a mental health professional to disguise his personal philosophy that all persons he claims are sociopaths must die, with a

mantle of expertise where the scientific community almost unanimously agrees that such predictions have as little reliability as reading tea leaves, is outright quackery.

Respondent's expert, Parker, conceded that a jury could be mislead by an expert's certain prediction of future violence (T 220, 221). Even Dr. Koons personally had never diagnosed a defendant in a capital case as sociopath based solely on a hypothetical question and knew of no others than Grigson and Holbrook who had (T 237). Dr. Coons agreed that his diagnosis could be *confirmed* with more information than presented in the hypothetical (T 231, 242). One might infer that his diagnosis was "not so comfortable."

That Respondent finds support in the California Supreme Court's opinion in *People* v. *Murtishaw*, 631 P.2d 446 (1981) demonstrates the extent of his misstatements when he suggests that the California Court recognized the validity of predictions of future dangerousness and that the prejudicial impact of such testimony outweighed its probative value under the California statute where such a determination was marginally relevant (Respondent's brief at 48, 49). In fact, the Murtishaw court held:

> "Arguably the risk that defendant will commit future violent acts is a matter 'relevant to aggravation' which reflects on defendant's future 'character' and 'mental condition.' In view of the *unreliability* of that forecast, however, the probative value of that testimony is far outweighed by its prejudicial impact. *One can image few matters more prejudicial at the penalty trial than testimony from an established and credentialed expert that defendant, if sentenced to life without possibility of parole, would be likely to kill again.* Such testimony implants in the mind of each juror the message that the death penalty, promptly carried into effect, is the only way to protect society from the defendant, the only way to forstall another instance in which defendant responds to frustration with deadly violence." (Id at 470)

The Murtishaw court, citing Dix, *Participation by Mental Health Professional in Capital Murder Sentencing* (1978) 1 Internat. J. of L. & Psych. 283, 397, relied on Dix's reasoning:

> "A trier of fact offered the opportunity to base a decision on the affirmative assertion by an apparently well-qualified professional that a defendant's execution is essential to saving the lives of others is likely to take that opportunity rather than face the difficult task of evaluating the offender's ethical culpability . . . [Such predictions tend] to discourage the sort of individualization that the Supreme Court has demanded of death penalty procedures." (Id. 470)

Although the California statute does not list as a specific aggravating circumstance that a defendant be found likely to commit future acts of violence, the Court explained at great length, that relevant or not to the statute, the unreliability of such predictions [based on extensive studies cited] were such as to be extremely prejudicial to the defendant. Central to the *Murtishaw* holding that psychiatric predictions of dangerousness are *inadmissible* is the court's recognition of the need for exacting standards of accuracy and reliability given the severity and finality of the death sentence. Garrett, *People* v. *Murtishaw: Applying the Frye Test to Psychiatric Predictions of Dangerousness in Capital Cases*, 70 Cal.L.R.1069 (1982). "[e]vidence which is barely reliable enough to satisfy a civil judgment or a limited commitment is not reliable enough to utilize in determining whether a man should be executed." *Murtishaw*, supra, at 771. In *Murtishaw*, there had been some form of examination and even then, the California court held such predictions unreliable and inadmissible. In Barefoot, there was not any sort of medical basis for the *expertise* paraded for the jury's reasoned consideration. That the Barefoot jury assessed death in less than an hour on the basis of this unreliable evidence, underscores the need for this Court prohibit the use of Barefoot-type *expert* opinions in all capital cases ". . . the penalty of death is different from a sentence of imprisonment, however long . . . Because of that qualitative difference, there is a corresponding difference in the need for

reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U.S. 280(1976); *Gardner* v. *Florida*, 430 U.S. 349 (1977).

Respondent selectively uses portions of scientific studies on the prediction of future violent behavior as support for his position. For example, Respondent relies on the work of John Monahan, *The Clinical Prediction of Violent Behavior* (1981) to sustain the reliability of predictions of future violent behavior, suggesting that Monahan approved and thought ethical that mental health experts predict future dangerousness (Respondent's brief at 45). The American Psychiatric Association in reviewing the same study in their amicus brief (APA Brief at 13) made these observations:

> "A more recent monograph [Monahan's study] again found that *psychiatrists were more often wrong than right in predicting violent behavior* over an extended period of time . . . [reviewing all major research published since 1970, the study] . . . concluded that no psychiatric procedures or techniques had succeeded in reducing the high rate of 'false positive' predictions—that is, affirmative predictions of future violent behavior that are subsequently proven erroneous. [quoting Monahan, at 49] . . . "it would be fair to conclude that the best clinical research currently in existence indicates that psychiatrists and psychologists are accurate *in no more than one out of three predictions of violent behavior* . . ." (emphasis added)

Petitioner's view at the evidentiary hearing was that two of three such predictions by mental health experts were unreliable, and erroneous (T, 97, 98, 105), and should therefore be inadmissible in Texas capital sentencing hearings, particularly where there has been no form of medical or psychological examination of the subject. Although Monohan viewed a history of repeated acts of violence as a *better* indicator of the expection of future violence, such in no wise increased, to any significant extent, the reliability of expert predictions.

Respondent speculates that studies concluding that future violence cannot be reliably predicted by *experts* fail to use as a sample population, persons with high rates of past repetitive

violent behavior, and suggests that Amicus APA shares this view (Respondent's brief at 46, footnote 10) when in fact, Amicus says:

> ". . . *psychiatrists are unable to predict future violent behavior* . . . this Court's decision in *Jurek*, supra, rejecting the vagueness challenge [does not mean that such predictions can never be made] . . . What we do contend, however, is that the long-term prediction of future dangerousness is an essentially lay determination . . . based not on the diagnoses and opinions of medical experts, but on the basis of predictive statistical or actuarial information . . . fundamentally nonmedical in nature.
>
> ". . . the most reliable—although by no means dispositive—predictors of long-term future violent behavior are factors *having nothing to do with psychiatric disorders or illnesses*" (Amicus APA, at 14).

Respondent contends that the high base rate of repetitive past violent acts increases the reliability of predicting the probability of future violent criminal acts. (Respondent's Brief at 21) Respondent then proposes that the bad reputation testimony in Barefoot's trial "can only evince repeated, widespread acts of criminal violence . . . such as unlawfully carrying illegal weapons." (Respondent's Brief at 47) Out of the presence of the jury, Barefoot proved that each character witness presented by the State based his opinion that Barefoot had a bad reputation as a peaceful and law abiding citizen on personal contact with Barefoot in relation to the arrests and convictions in evidence before the jury and no other "criminal acts of violence to other persons" (R.1900-1963) In Texas, reputation testimony is nothing more than hearsay, or gossip which according to Dr. Fason, has no diagnostic significance (T 23). Surely, this Court will not consider bad reputation as the standard of prior criminal acts of violence upon which any person, lay or expert can predict future violence, constituting a future danger to society, mandating death.

This Court could not have envisioned the use of gossip and hearsay as the basis for reliable psychiatric predictions of future dangerousness when the Court in *Jurek* v. *Texas*, 428

U.S. 262 (1976) and *Estelle* v. *Smith*, 451 U.S. 454 (1981), did not rule out the *proper* use of psychiatric evidence at the punishment hearing in a Texas capital case.

In sustaining the Texas capital sentencing statute in *Jurek*, supra, a plurality of this Court held that the Texas Court of Criminal Appeals intended that a jury could consider all evidence relevant to sentencing, and that predictions of future behavior was a task not uncommon, but used daily in the criminal justice system. In *Jurek*, supra, this Court used as examples, such decisions as whether to release a defendant to bail. That decision is not based solely on a determination of future behavior, dangerousness or non-dangerousness, but takes into consideration the presumption of innocence, the right to bail, the nature of the offense charged, the prior criminal history of the accused and the practicalities of overcrowded conditions in jails. A sentencing authority also doesn't determine appropriate sentencing based solely on future conduct, but considers that the punishment be proportional to the nature of the offense with considerations of the individual offender. Parole authorities evaluate prior criminal history, the offense for which one is incarcerated, the "good time" accumulated, and support systems in the free world when considering whether to release a prisoner. The intent of *Jurek*, supra, was broader than has been applied in practice. In Texas, the fact finders' discretion in considering all evidence relevant to sentencing is removed when an *expert* testifies that a capital murderer is a sociopath, of the most severe type, untreatable, who will 100% certainly and absolutely commit future acts of criminal violence constituting a threat to society both in and out of the penitentiary. Unless this Court limits the use of *Barefoot type* predictions, based on fantastic speculation, a dangerous precedent will be set, not only in Texas, but in every state where death is considered an 'appropriate' penalty. The fact-finders' role is necessarily impacted by such unreliable testimony, presented in a way to give no alternative except an affirmative answer to the ultimate issue. Evidence of family history and associations, prior or current mental disorders, use of intoxicants at or near the time of the offense, age, etc., carry

no weight for the factfinder in predicting future dangerousness when an expert predicts with any degree of certainty a defendant's future of criminal violence to all other persons in society.

In *Eddings* v. *Oklahoma*, 71 L.Ed.2d 1 (1982) Chief Justice Burger, writing for the dissent, pointed out the unreliability of the psychiatric, psychological, and sociological evidence in Eddings case because of the limited opportunity to test and observe Eddings, the "atmosphere" of the testing and speculation from the results. The majority, in *Eddings*, supra, based their opinion on the failure of the trial court to consider such evidence, as a matter of law, in mitigation of punishment, and did not determine whether the evidence offered was reliable. Chief Justice Burger, although noting it immaterial to a correct decision, specifically addressed the issue of reliability of such evidence:

> ". . . Dr. Gagliano, a psychiatrist, opined on the basis of a one-hour interview—during which petitioner's attorney was present and refused to allow questioning about petitioner's 'mental status' on the day of the shooting—that at the time petitioner pulled the trigger, 'he acted as a seven year old seeking revenge and rebellion' against his stepfather, a policeman. Dr. Gagliano was also willing to state categorically on the basis of this single interview, and without reference to the results of the psychological testing of Eddings, that *Eddings was 'preordained' to commit the murder* from the time his parents were divorced, when he was five. *This sort of 'determinist' approach is rejected by an overwhelming majority of psychiatrists.* (*Eddings*, supra, at 16, footnote 4)

Chief Justice Burger characterized Gagliano's opinion concerning Eddings' dissociation at the time of the crime as rather *'fantastic speculation'* (*Eddings*, supra, footnote 10 in dissenting opinion) The use of the expert diagnostic and predictive testimony in Barefoot was just the sort of *determinist* approach criticized in *Eddings*, supra, and at best, fantastic speculation.

Barefoot's attempts to impeach, cross examine, and argue against the reliability of the experts' opinion and predictions

are characterized as vigorous (Respondent's brief at 15) but did not, as Respondent contends, afford Barefoot the constitutional protections mandated by this Court.

Even if Barefoot had called mental health experts on his own in an attempt to counter or rebut the devastating testimony of Grigson and Holbrook, and if Barefoot's experts challenged the State's witnesses testimony as inherently unreliable and unethical, "[s]ince members of the jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given." *Gregg* v. *Georgia*, 428 U.S. 153 (1976). In its brief, the American Psychiatric Association noted:

> "Nor can cross-examination or rebuttal experts limit or remove this prejudice. Because most psychiatrists do not believe they possess the expertise to make long-term predictions of dangerousness, they cannot dispute the conclusions of the few who do. Instead of offering a countervailing pediction of non-dangerousness in a particular case, they (or defense counsel on cross-examination) can only advance a challenge to the asserted 'expertise' of the prosecution psychiatrist. The likely result, therefore, is that the jury will hear not the traditional battle of expert conclusions, but only a dispute over one expert's ability to reach the conclusion that he did. In that situation, it remains all too easy for the jury to avoid its difficult sentencing decision by seeking refuge in the only "medical" conclusion concerning dangerousness that is before it. (Amicus APA, at 18)

It is unreasonable to believe that the jury chose to discard properly guided by the trial court's instructions to take into consideration all of the evidence submitted. (JA 4). The trial court's further instruction to give such weight and value as you believe it should have to the testimony of certain of the witnesses who *purport to be skilled in their line of endeavor and who are known in law as expert witnesses* (JA 4) guided the jury into affirmative answers and a sentence of death.

The remote control diagnoses of Barefoot by Grigson and Holbrook climaxing in their absolutely certain prediction of future dangerousness is no less *fantastic speculation*, particu-

larly where there has been *no* examination or evaluation of the subject. The use of such testimony cannot be reliable evidence where the overwhelming majority of professionals in the field of expertise [mental health] are of the opinion that such predictions, under the circumstances of Barefoot's case, cannot be made with even reasonably accuracy and that even under the best of conditions, psychiatric predictions of long-term future dangerousness are wrong in at least two out of every three cases. The unreliability of such evidence goes to the admissibility, not the weight of such evidence. In *Eddings*, supra, the majority noted that "Lockett required the sentencer to listen" (at 876, n.10). If the lower court's ruling in Barefoot is sustained, this Court will be overturning the mandate for the sentencer to listen, and consider the individualized factors in considering life over death. The Barefoot sentencer must execute or set upon society an individual devoid of conscience, 100% certain to commit future acts of violence. The expert speculation in Barefoot cannot be sustained where it so distorted the factfinders' role to the extent that deprived Barefoot of the protections provided by the Sixth, Eighth and Fourteenth Amendments of the Constitution of the United States. The use of same requires this Court vacate Barefoot's death sentence.

CONCLUSION

In capital punishment jurisdictions, Texas stands alone in the use of the prediction of future dangerousness as the critical issue in assessing death. Every other statute provides for the sentencer to consider a broad range of mitigating circumstances in determining whether leniency is merited, and a life spared. Evidence of the individualized character of the Texas capital defendant is only relevant to one special issues presented "whether the defendant will commit criminal acts of violence that will constitute a continuing threat to society." In Texas the jury can only answer "yes" or "no." That limitation on consideration of evidence in mitigation of punishment violates this Court's mandate in the face of Eighth and Four-

teenth Amendment considerations not forseen in *Jurek*, and not addressed in *Smith*.

When that ultimate issue is affirmatively answered by a witness purporting to have expertise in predicting future dangerousness, with or without examining the defendant, the sentencer can neither consider nor justify mitigation. Death is mandated.

In referring to the use of hypotheticals much like Barefoot's, and the prediction of future dangerousness by 'experts,' a federal district court said:

> "The prevailing view among psychiatrists and professional psychiatric associations, a view to which this court subscribes, is that to the extent that long-range dangerousness can be predicted (a view not accepted by the psychiatric community) an opinion as to an individual's future penchant for violence which does not follow extensive examination and is not based on a great deal of complex and in-depth information, is not a professional, but a lay opinion. However, when this lay opinion is proffered by a witness bearing the title of "Doctor," its impact on the jury is much greater than if it were not masquerading as something it is not." *White* v. *Estelle*, 554 F.Supp. 851 (S.D. Tex. 1982)

Scientific studies acknowledge that predictions of future dangerousness over the long-term are wrong two out of three times. Such predictions, made without extensive psychological and psychiatric evaluation and examinations have even lesser reliability. For this Court to permit an execution on the basis of the expertise used by the State at the punishment phase of Barefoot's trial, is to overturn the long line of cases in which this Court has mandated that in capital cases, death is so qualitatively different that the need for reliability is greater and the sentencer must consider the individual and all relevant evidence in determining that the execution of a human being is the only alternative and appropriate punishment. Petitioner submits that the Texas death penalty statute does not evenly apply the considerations mandated by this Court and in this case, the fact-finder was precluded from considering any

punishment except death, where the ultimate issue was answered in the guise of expertise that does not exist. The resulting mandate in Barefoot requires a reversal of this sentence and the prohibition against the admissibility of such testimony in any capital case. In view of the practical application of evidentiary rules of admissibility and relevancy since *Jurek*, the Texas statute necessarily limits consideration of all relevant mitigation evidence of the individual and cannot withstand this constitutional challenge.

Respectfully submitted,

WILL GRAY
(Counsel of Record)
CAROLYN GARCIA
2038 Lexington Street
Houston, Texas 77098
(713) 759-0585
Counsel for Petitioner